BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

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	FINAL ORDER
	AND
IN THE MATTER OF CHANGE OF APPROPRIATION OF WATER RIGHT NO 41H 01223599 BY MGRR #1, LLC	**ORDER DENYING MOTION TO GRANT AUTHORIZATION OF CHANGE APPLICATION AND MOTION TO RECONSIDER 4/8/05 ORDER DENYING MOTION TO REOPEN THE RECORD**

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BACKGROUND

The proposal for decision in this matter was entered on March 22, 2005. The proposal recommended that Application To Change Appropriation No. 41H 01223500 be denied.

The Applicant filed timely written exceptions and Objector Gramer filed timely responses to exceptions. The Applicant, through counsel Carol Brown, requested an oral argument hearing. Applicant's Exceptions also included a Motion To Take Notice Of The Record In Water Court Case 41H124, and a Motion To Grant Authorization of Change Application, or in the alternative, Motion To Reconsider 4/8/05 Order Denying Motion To Reopen The Record.

Oral argument was held June 9, 2005, in Helena, Montana. Carol Brown presented arguments on behalf of the Applicant MGRR #1, LLC, hereafter "Applicant". Applicant Mark Buechley and Ms. Nancy Zalutsky, paralegal with Water Right Solutions, Inc, also attended the oral argument. Ms. Brown provided the Hearing Examiner a list of Authorities For Oral Argument consisting of a list of Department decisions. Objector Gramer notified the Department prior to the hearing that he is not able to attend the oral argument and asked that his written exceptions be considered in reaching a decision in this matter. The Hearing Examiner notified Applicant's counsel immediately prior to the hearing that Mr. Gramer would not be attending the oral argument and that his written exceptions would be considered in reaching a decision in this matter.

STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order:

> reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

An agency's reversal of the findings of fact of its hearing examiner will not pass muster on judicial review unless the court determines as a matter of law that the hearing examiner's findings are not supported by substantial evidence. (Moran v. Shotgun Willies, Inc., 270 Mont. 47, 889 P.2d 1185 (1995)) "Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. (Strom v. Logan, 304 Mont. 176, 18 P.3d 1024 (2001))

Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. (ARM 36.12.229(2)) For this reason the Hearing Examiner **DENIED** the Motion To Take Notice Of The Record In Water Court Case 41H124 during the hearing. The record was closed at the end of the original hearing. No evidence presented after the record was closed has been considered in this decision.

Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, and authorities upon which the party relies. (ARM 36.12.229(1))

I have considered the exceptions and reviewed the record under these standards.

DISCUSSION

Exception No. 1: Exhibit A-8 is not admitted into the record: Applicant argues that the Examiner's November 10, 2004, *Prehearing Conference Minute Order* conveyed the clear message that late filed notice would be accepted, subject to objection, and thereby extended the deadline for filing disclosures. In sustaining the objection to the exhibit the Hearing Examiner is doing just as he declared in the Order. Exhibit A-8 received objection and he sustained the ruling. Apparently the Applicant did not object to Objector Gramer's exhibits. Applicant did not

present any citations supporting the claim that all exhibits, with or without objection, must be admitted or denied alike. In addition, the Applicant could have provided the document author for cross-examination. It is also true, that had timely disclosure occurred, Objector Gramer would have had the opportunity to depose or subpoena the author of Exhibit A-8 to obtain the opportunity to cross-examine the document author under oath. Here, Objector Gramer should have the opportunity to cross-examine the author of a document which he may not believe to be true. This opportunity can come pre-hearing or at hearing. *See* Miller v. Frasure, 264 Mont. 354, 871 P.2d 1302 (Mont.,1994). Here, Objector Gramer objected to the use of this exhibit which was not prepared under oath, and because the author was not available for cross-examination. Even though the Hearing Examiner did not mention Objector Gramer's right to cross-examine the author of the witness directly, he decided the use of the exhibit was not appropriate because of the late timing of the disclosure. Objector Gramer had no opportunity to subpoena the author prior to the hearing. No offer of proof was made by the Applicant at the time of the Hearing Examiner's ruling on the admittance of the Exhibit A-8.

The Examiner's ruling will not be changed. Exhibit A-8 is not admitted.

Exception No. 2: Finding Of Fact No. 3 – referring to the past use of water right claim numbers 41H 12235-00 and 41H 12236-00 includes…: Applicant's Exception Nos. 2, 4, and 5 to Finding of Fact Nos. 3, 8, and 9 all refer to the historic use of water under the water rights being changed for the 85 acres being removed from irrigation.

The Hearing Examiner's Finding of Fact No. 3 is a recital from the public notice based upon what the change application requests, and will not be changed.

Applicant takes exception to the Examiner's reference to the evidence regarding the past four years use. I do not see where the Examiner relied upon the evidence (or lack of) regarding use on the 85 acres during his ownership to make his decision. The Examiner's references to lack of use during the past four years will not be deleted.

The Applicant believes that sufficient proof of historic use lies in the Montana Water Court Temporary Preliminary Decree and Hearing Examiner's Finding of Fact No. 8. The Hearing Examiner had sufficient evidence to find that the 85 acres had been historically irrigated, but not the extent of irrigation. *See* Finding of Fact No. 8. It is in Finding of Fact No. 9 that the Examiner gets to the meat of the historical use issue. Therein he states: "**There is no evidence in the record that the requested change would not expand the historic use of the water rights.**" (Emphasis added) He neither saw nor heard evidence beyond innuendo as to how the historic use actually occurred. There is evidence of Applicant's general

understanding of flood irrigation, of what the maximum amount of water that can be diverted is, or average consumption (as indicated in Applicant's Exception No. 4, page 12). But, as the Hearing Examiner points out, Objector Gramer's repeated questions indicate concern that the right may be expanded under the proposed change, and that the actual pattern or practice of water use on these 85 acres is missing from the record.

Applicant contends that the flow rate, period of use and total acres under the claims being changed are known citing Bell v Armstrong, The West Gallatin River Decree, Cause No. 3850, Gallatin County; and the Montana Water Court file in Water Court Case No. 41H-124 and the modified abstracts issued by the Water Court for these water rights (not a final decree). Applicant contends there is sufficient evidence in the record to determine the volume historically used and currently used on the total acres. Knowing the decreed flow rate, period of use, and total acres irrigated does not allow one to calculate more than the maximum amount of water that could be diverted under a water right. It is the actual pattern of the use and the actual amount consumed, which may be less than the maximum, that must be used to determine if a right is being expanded such that other appropriators may be adversely affected. Here, changing an irrigation use which may not be a continuous use to a continuous use in a fish pond may be an expansion of the historic use. The Hearing Examiner did not find sufficient facts to make that determination. The applicant in a change proceeding in Montana must prove the pattern of historic use of the water to be changed when possible expansion of the use may occur. *See In The Matter Of Application No. G(W) 001422-41QJ by Anderson Ranch*, Final Order (1994).

Applicant argues that the Department has recommended the use of Department Form 615 R/00 to determine the historical crop consumptive use, referring to Jan Mack's testimony at Track 48 and Track 49 of the hearing transcript prepared by the Applicant. This Form is used to provide "general water requirements" for various uses. Looking at Mr. Mack's last answer on Track 47, Mr. Mack does not directly answer the question, but instead responds with how change applications are processed: "What you can change is the amount of water that's historically or consumptively used by the crop, rather than what was applied to the field. So, **if** two and a half acre feet was consumed by the crop…" (emphasis added). Applicant's exception cites multiple DNRC Application files (bottom of page 7) in support of methods used to calculate consumptive use. I found no hearing record for these cites and am left wondering if the cases cited went to Department hearing. I have insufficient information to determine whether these cases support Applicant's position. Applicant's approach contrasts that In Re *Anderson Ranch*

(*In The Matter Of Application No. G(W) 001422-41QJ by Anderson Ranch*, Final Order (1994)) and Mr. Mack's testimony at Track 47.

The Hearing Examiner here cannot use the Water Court Water Right Decree information to determine if allowing the change will adversely affect other appropriators. The Water Court Decree does not provide information such as the pattern of use within the elements of the Decree or the amount of water consumed. The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer, Final Order, (1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, Final Order, (1992). So in a change proceeding, the applicant has a burden beyond that of merely proving they have a water right which they can change.

Applicant takes exception that no notice was provided to Applicant that historic use would be a pivotal issue in this matter. Applicant had knowledge that adverse affect on other water rights is a criterion for changing a water right. The Department file contains a letter from Pond And Stream Consulting, Inc., that refers to the adverse affect criterion. Therein it states there is no potential for adverse affect because no increase is requested in the annual volume diverted or the maximum flow rate diverted, no change in the point of diversion, and no change in the return flow to Big Bear Creek. However, in light of Objector Gramer's questions, the Hearing Examiner found this inadequate. In addition, the *WATER RIGHT CHANGES, INFORMATION AND INSTRUCTIONS* (8/02) states in part: "The water rights being changed are subject to a critical and intense review." When the Applicant was preparing the Application and his case for hearing the instruction sheet provided advance warning of a critical and intense review of the water rights being changed. In the record here, the Hearing Examiner found no information on the actual amount of water historically put to use or the pattern of that use that would allow him to find the right is not being expanded. *See In The Matter Of* Applicati*on No. 20737-s41H (S) by City of Bozeman / Lichtenberg*, Proposal For Decision and Memorandum (1985); *In the Matter of G(W) 001422-41QJ by Anderson Ranch*, Final Order (1994).

The Hearing Examiner has no evidence he can assess to determine whether the historical use is being expanded. Finding of Fact Nos. 8 and 9 will not be changed.

Exception No. 3: Finding Of Fact No. 5: I find the amended place of use to be removed from irrigation does not prejudice the rights of other persons who did not object. This exception to Finding of Fact No. 5 is to a finding wherein the Hearing Examiner supports his conclusion that republication of the Application after it was amended at hearing is not needed.

The Hearing Examiner's finding appears to be based upon substantial evidence and will not be changed.

Exception No. 4: Finding Of Fact No. 8: Regarding Historical use.

See Exception No. 2: above.

Exception No. 5: Finding Of Fact No. 9: Applicant submitted no evidence to support the flow rate, volume, period of use, and consumption of water historically used on the 85 acres proposed to be changed.

See Exception No. 2: above.

Exception No. 6: Finding Of Fact No. 12: The Examiner declines to make a finding for the proposed beneficial use of fishery. Applicant cites Mont. Code Ann. §2-4-621(3) suggesting that the Hearing Examiner must make a finding and conclusions on each issue (criteria) rather than each issue necessary for the decision. The district court is not required to make specific findings on every fact presented or every piece of evidence offered. It need only include "the essential and determining factors upon which [its] conclusions rest." *See* In Re The Marriage Of Marvin Phillip Drake, 310 Mont 114, 1211, 49 P.3d 38, 42 (2002).

Because they are not necessary for the Hearing Examiner's decision to deny, Finding of Fact No. 12 and Conclusion of Law No. 5 will not be changed.

Exception No. 7: Finding Of Fact No. 13: No arrangements have been made with government agencies or local fire departments for access to the water for their operations or for specified amounts of water (for the purpose of fire protection). The record shows the amount of water requested for this purpose is twice what was used in the Purdy fire without explanation of why twice that amount is needed. In addition, the testimony suggests this purpose is secondary to the fishery purpose and not separate and distinct from the fishery purpose. That is, water from the fishery will be used in the event water for fire suppression is needed. The Hearing Examiner did not find sufficient evidence in the record as to why the amount requested is the amount needed for a fire protection purpose. The Hearing Examiner correctly points out that when a temporary emergency appropriation occurs, the Department's administrative rules allow such use without a water right.

Finding of Fact No. 13 and Conclusion of Law No. 5 will not be changed.

Exception No. 8: Conclusion Of Law No. 2: The Exception to Conclusion of Law No. 2 is to that portion containing the Hearing Examiner's discussion and conclusion regarding the

adverse affect criterion found at Mont. Code Ann. §85-2-402(2)(a). The Hearing Examiner refers the reader to Finding of Fact Nos. 8 and 9 for this portion of his conclusion. Applicant states that there is no evidence that the 85 acres did not achieve maximum crop production. More importantly, the Hearing Examiner found no evidence that the 85 acres did achieve maximum crop production and therefore saw potential that authorization of this change might amount to an enlargement of the right.

Conclusion of Law No. 2 will not be changed.

Exception No. 9: Conclusion Of Law No. 5: Department declines to make a conclusion on this issue because the change application will not be granted on other grounds as herein set forth, and that the Applicant has not proven the amount of water requested for the propose use of fire protection is a beneficial use.

See Exception No. 6:, and Exception No. 7: above. Conclusion of Law No. 5 will not be changed.

Exception No. 10: Conclusion Of Law No. 8: Applicant has not proven that all of the applicable criteria have been met, and therefore the Department may not grant this application. The exception here is a reiteration of the exceptions to other findings and conclusions.

Conclusion of Law No. 8 will not be modified.

Exception No. 11: Proposed Order: Applicant excepts to the Proposal's denial repeating generally the exceptions to the Findings and Conclusions in the Proposal and that the Proposal constitutes a violation of the statutory and rule notice requirements and a violation of the Applicant's rights. I see failure in preparing for the hearing on the Applicant's part as the cause of denial here, and not a failure on the part of the Department or Hearing Examiner.

Without a change in the Findings of Fact and Conclusions of Law, the Proposed Order cannot, and will not be changed. Applicant's Motion To Grant Authorization of Change Application is **DENIED**.

Applicant's Motion In The Alternative states that Applicant can produce evidence of historic use since 1980 and requests that the record be reopened to allow such evidence into the record. The argument for allowing the record to be reopened is that the 'criteria' of historical use was not noticed. The issue of notice has been discussed above and this Hearing Examiner does not find fault with the Department's notice in this matter. If Applicant has the evidence

found lacking in this matter, he can bring it forth in a new application. The Motion To Reconsider 4/8/05 Order Denying Motion To Reopen The Record is **DENIED**.

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference the Findings of Fact and Conclusions of Law in the Proposal for Decision.

Based on the record in this matter, the Department makes the following order:

ORDER

Application to Change a Water Right No. 41H 01223599 by MGRR #1, LLC is hereby **DENIED**.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 9th day of November 2005.

Charles F Brasen
Hearing Examiner
Water Resources Division
Department of Natural Resources and
Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER AND ORDER DENYING MOTION TO GRANT AUTHORIZATION OF CHANGE APPLICATION, AND MOTION TO RECONSIDER 4/8/05 ORDER DENYING MOTION TO REOPEN THE RECORD was served upon all parties listed below on this 9th day of November 2005 by first class United States mail.

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406-444-6615

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

* * * * * * *

IN THE MATTER OF APPLICATION TO CHANGE A WATER RIGHT NO. 41H 1223599 BY MGRR #1, LLC.	)))	**PROPOSAL FOR DECISION**

* * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on November 24, 2004, in Bozeman, Montana, to determine whether an authorization to change a water right should be issued to MGRR #1, LLC, hereinafter referred to as "Applicant" for the above application, under the criteria set forth in Mont. Code Ann. § 85-2-402(2). All water rights involved in the change application were listed in the required public notice.

APPEARANCES

Applicant appeared at the hearing by and through its managing partner, Mark Buechley. Scott Davis, Pond and Stream Consulting, Inc., and Jan Mack, Water Resources Specialist, Bozeman Water Resources Regional Office, were called to testify by Applicant. Objector Gary Gramer appeared at the hearing on his own behalf, and called Jan Mack and Mark Buechley to testify.

EXHIBITS

Applicant offered seven exhibits for the record (beginning with A-2). The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits A-2, A-3, A-4, A-5, A-6, and A-7. Objector Gramer objected to the admittance of Applicant's Exhibit A-8, and the matter was taken under advisement. Exhibit A-8 is not admitted into the record. Discussion of Exhibit

A-8 is contained below.

Applicant's Exhibit A-2 is a topographic map prepared by Pond and Stream Consulting, Inc. and dated November 18, 2004, detailing the location of the existing and proposed water rights/uses.

Applicant's Exhibit A-3 is a letter from Pond and Stream Consulting, Inc. to the Hearings Examiner dated November 16, 2004, in support of the Mont. Code Ann. § 85-2-402(2)(c) beneficial use criteria.

Applicant's Exhibit A-4 is a letter from Pond and Stream Consulting, Inc. to the Hearings Examiner and dated November 16, 2004, in support of the Mont. Code Ann. § 85-2-402(2)(a) adverse affect criteria.

Applicant's Exhibit A-5 is a series of photographs of the existing point of diversion, conveyance structures, place of use, and proposed pond site, all taken on November 8, 2004.

Applicant's Exhibit A-6 is a topographic map, prepared by Pond and Stream Consulting, Inc. and dated November 18, 2004, depicting conveyance ditches and contour ditches within the place of use to be removed from irrigation.

Applicant's Exhibit A-7 is a letter from Pond and Stream Consulting, Inc., describing various diversion structures and proposed measuring device design and installation.

Applicant's Exhibit A-8 is NOT ADMITTED. Applicant's Exhibit A-8 is a signed document of Mr. Mark Matheny, dated November 16, 2004. Objector Gramer objected to the admittance of A-8, on the grounds that he didn't necessarily believe the contents of the document, and that Mr. Matheny wasn't under oath when the document was produced. The final day for discovery ended on October 6, 2004, and the First Prehearing Order specified that witnesses or evidence not properly disclosed could be precluded from use at hearing (*See In The*

Matter Of Application 41H 11548700 by PC Development, Final Order (2003)). Exhibit A-8 was not properly disclosed and is precluded at hearing. The Hearing Examiner sustains the objection to admittance of Exhibit A-8.

Objector offered four exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibits O-1, O-2, O-3, and O-4.

Objector's Exhibit O-1 is an aerial photograph, dated 8-12-1995, of Applicant's place of use to be removed from irrigation, and surrounding area.

Objector's Exhibit O-2 is a photograph, taken by Objector Gramer on 7-30-2003, of Applicant's proposed place of use to be removed from irrigation. Photo was taken from the northeast corner of the 85-acre tract.

Objector's Exhibit O-3 is a photograph, taken by Objector Gramer and dated 11-2004, of Applicant's proposed place of use to be removed from irrigation. Photo was taken from a similar location as Exhibit O-2.

Objector's Exhibit 0-4 is a photograph, taken by Objector Gramer and dated 11-2004, of the southernmost portion of Applicant's proposed place of use to be removed from irrigation. Photo is looking to the west.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

PRELIMINARY MATTERS

During the hearing Applicant offered an amendment to the location of the place of use to be removed from irrigation. The amended proposal (Exhibit A-2) removes 85 acres from irrigation, all lying north of the Scahill-Steward Ditch, and which slope towards the Wortman

Creek drainage. Applicant offered the amendment to accommodate a suggestion by Objector Gramer during a site visit by the parties prior to the hearing. The Hearing Examiner's proposal is based on the amended acreage . See Finding of Fact No. 5.

FINDINGS OF FACT

Application and Environmental Assessment

1. Application To Change A Water Right No. 41H 1223599, in the name of MGRR #1, LLC and signed by Mark Buechley was filed with the Department of Natural Resources and Conservation (Department) on January 17, 2003.

2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding. (Department file).

3. Past use of water for water right claim numbers 41H 12235-00 and 41H 012236-00 includes a point of diversion from Big Bear Creek at a point in the SWNWNE Section 32, T03S, R05E, Gallatin County. Diversion occurs from May 1 to November 30, at a combined rate of 6.5 cubic feet per second. Water is used for irrigation purposes, and the place of use is 215 acres in Section 19, and 240 acres in the N2 Section 30, all in T03S, R05E.

4. Applicant proposes to remove 85 acres from irrigation for water right claim numbers 41H 12235-00 and 41H 12236-00 in exchange for a reservoir with a capacity of 30.0 acre-feet, to be used for fishery and fire protection purposes. The flow rate proposed for the reservoir is 226.0 gallons per minute, up to 213.0 acre-feet, to be diverted between May 1 and November 30 of each year. The volume of water formerly used for irrigation on the 85 acres is proposed to supply the reservoir. The application includes a change in place of use, purpose of use, and addition of storage for both of the underlying water right claims.

5. Applicant amended the location of the place of use to be removed from irrigation. The amended application (Exhibit A-2) removes 85 acres from irrigation, all lying north of the Scahill-Steward Ditch and which slope towards the Wortman Creek drainage. Objector Gramer did not raise an objection to the amended application during the hearing.

Finding. I find the amended place of use to be removed from irrigation does not prejudice the rights of other persons who did not object. The amended acres are in the same general vicinity as the acres originally proposed, and the area of potentially affected water rights is not changed. Applications may be amended after public notice if amendments would not prejudice anyone (*See In the Matter of Application No. 82173 76M by Simmons,* Final Order (1993)).

6. The legal land description of the amended application of the place of use proposed to be removed from irrigation is: 1 acre in the S1/2 SE1/4 SE1/4 Section 19, T03S, R05E; and 84 acres in the NE1/4 Section 30, T3S, R5E, all in Gallatin County (Exhibit A-2).

7. The additional proposed purposes of water are fishery and fire protection, to be located in the SE1/4 NW1/4 NE1/4 Section 30, T03S, R05E, Gallatin County. The volume of water proposed for the purpose of fishery is 208.0 acre-feet, and the volume of water proposed for fire protection is 5.0 acre-feet, for a combined total of 213.0 acre-feet (testimony of Scott Davis).

Historical Use

8. **Discussion**. The 85 acres proposed to be removed from irrigation are shown as irrigated in the 1953 Gallatin County Water Resources Survey (Department file), as well as Applicant's Exhibits A-5 and A-6. The record also includes copies of the Statements of Claim, a Montana Water Court Masters Report for the underlying water rights to be changed, and a crop consumption table. No party submitted further evidence as to the actual flow rate, volume,

period of use, or the amount of consumption of historic use of water for the 85 acres, nor is the last time irrigation occurred on this parcel known. Applicant testified of his knowledge that water has been diverted and used on other areas encompassed by the underlying water rights, but could not verify irrigation taking place on the 85 acres proposed to be changed in the approximate four-year period that he has owned the property. No historic flow measurements are known to have been taken. Applicant testified that his general understanding of flood irrigation is that once the ditch is turned on, it typically remains on during the irrigation season, although water is applied to individual places of use in stages. No evidence was submitted as to specific irrigation patterns regarding the specific land proposed to be removed from irrigation. The formula for calculating historic volume consumed was based on an assumed crop consumption value, for alfalfa, of 2.5 acre-feet per acre for achieving maximum crop production (Department file; testimony of Scott Davis and Jan Mack). No diversion records or evidence was provided to support the concept that maximum crop production ever occurred on the 85 acres. It is important to note that Objector Gramer repeatedly questioned Applicant and Applicant's witnesses regarding historical use, and none of the testimony verified the historical flow rate and volume of water claimed in the water rights.

Finding. I find the 85 acres proposed to be removed from irrigation have been irrigated, but the flow rate, volume, period of use, and consumption of water historically and beneficially used is unknown.

Adverse Affect

9. The fishery and fire protection uses are proposed to be continuously diverted at 226.0 gallons per minute throughout a 214-day period of appropriation. Other than reference to the water right claims filed with the Department, Applicant submitted no evidence to support the

flow rate, volume, period of use, and consumption of water historically used on the 85 acres proposed to be changed. Of particular concern is that Big Bear Creek is located within the Upper Missouri River basin closure area (Mont. Code Ann § 85-2-343), and is designated by the Department of Fish, Wildlife and Parks as a chronically dewatered stream (Department file). Any additional depletions from this stream will exacerbate its dewatered condition. The water rights proposed to be changed share the most senior priority date on Big Bear Creek (Department file). If the proposed change constitutes an enlargement of the water rights, this seniority status could result in expanded diversions and adverse effect on other water users.

Finding. There is no evidence in the record as to the actual flow rate, volume, period of use, and consumption of water historically and beneficially used on the 85 acres proposed for change. There is no evidence in the record that the requested change would not expand the historic use of the water rights.

Adequacy of Appropriation Works

10. The Scahill-Steward Ditch has existed for many years and provided water for irrigation purposes, as referenced by the 1953 Gallatin County Water Resources Survey. Applicant recently replaced the existing headgate at Big Bear Creek with a 30" Waterman headgate with concrete headwall (Exhibit A-5). Applicant has consented to the installation of a Parshall Flume immediately downstream of the point of diversion to measure flow (testimony of Mark Buechley and Scott Davis). The secondary diversion structure in the Scahill-Steward Ditch will be a slidegate structure. From that point water will be conveyed approximately 160' in a 6" pipe to a bentonite-lined open channel, which will then convey water approximately 300' to the reservoir. A V-Notch Wier will be installed where the pipe flows into the open channel for water measurement.

Finding. The proposed means of diversion, construction and operation of the appropriation works are adequate (Department file, testimony of Mark Buechley).

Beneficial Use

11. The proposed uses of water are for fishery and fire protection. The flow rate to be used for both purposes is 226.0 gallons per minute, and the volume is 208.0 acre-feet for fishery, and 5.0 acre-feet for fire protection. The flow rate of 226.0 gallons per minute would be diverted continuously from May 1 through November 30 of each year.

12. **Discussion (fishery).** Applicant cited statute (Mont. Code Ann. § 85-2-102(2)(a)); the Department's rescinded Administrative Policy No. 20 (Fish, Wildlife and Recreation Ponds, 1998); Exhibit A-3 (letter from Scott Davis); and Witness/Consultant Scott Davis' personal opinion and experience as evidence of beneficial use. Applicant's primary justification for flow rate was based upon a formula used for rearing fish in fish hatchery environments; Piper et. al., Fish Hatchery Management (1982). Although the proposed reservoir is not a fish hatchery, Scott Davis testified the hatchery formula is applicable because it achieves the same objective, to grow a healthy population of fish. The flow rate was derived by combining separate flow index calculations for a sustained adult fish population, and an annual stocking rate of 10,000 fingerlings per year, of which 85%-90% of the fingerlings would be lost to predation (Scott Davis). The proposed flow rate provides for an approximate 30-day turnover rate for the reservoir. Scott Davis testified that inadequate turnover could result in fish health problems such as copepod infestations.

The Hearing Examiner declines to make a finding for the proposed beneficial use of fishery. See Conclusion of Law No. 5.

13. **Discussion (fire protection).** Applicant's desire to add fire protection as a beneficial use is primarily for emergency purposes of fighting forest or grass fires. The reservoir would be available to government fire fighting agencies if such emergency were to occur (Scott Davis). However, no arrangements have been made with government agencies or local fire departments for access to the water for their operations (Mark Buechley), or for specified amounts of water. Per Administrative Rules of Mont. 36.12.105, temporary emergency appropriations may be made without prior approval from the Department.

Finding. Applicant did not prove the amount of water proposed for fire protection is a beneficial use.

Possessory Interest

14. **Finding.** Applicant owns the property where the proposed place of use is located. Applicant has proven it has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use (Department file).

Salvaged Water

15. Applicant did not apply to salvage water (Department file).

Water Quality

16. The Department's *Change Objection Determination* (Form 611-606 r6/2002) indicates that no valid water quality objections were received, therefore, Applicant is not required to prove the water quality criteria. (Department file)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. § 85-2-402 (2003).

2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann. § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. § 85-2-402(2)(a) through (g).

In a change proceeding it must be emphasized that other appropriators have a vested right

to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 16.02(b) (1991 edition); W.Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's water right operating in priority. Application for Water Rights in Rio Grande County (2002) __Colo. __, 53 P.3d 1165.

Montana's change statute reads in part:

> 85-2-402. Changes in appropriation rights. (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. An appropriator may not make a change in an appropriation right except, as permitted under this section, by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.
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> (2) Except as provided in subsections (4) through (6), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:
>
> (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
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> ....
>
> (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

Montana's change statute simply codifies western water law.[1] One commentator

[1] Although Montana has not codified the law in the detail Wyoming has, the two

describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation dispute is whether other appropriators, especially junior appropriators, will be injured because of an increase in the consumptive use of water. Consumptive use may be defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream system through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." An appropriator may not increase, through reallocation [changes] or otherwise, the historic *consumptive* use of water to the injury of other appropriators. *In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use.* As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriations.

Robert E. Beck, 2 Water and Water Rights at § 16.02(b), p. 277-78 (italics added).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986), the court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of *requantification of the water right based on actual historical consumptive use.* In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.

(italics added); Application for Water Rights in Rio Grande County (2002) __Colo. __, 53 P.3d 1165 (the right to change a water right is limited in quantity by the historic use of the water at the original point of diversion; to determine that a requested change will not amount to an enlargement, historical use must be quantified).

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states' requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

> When an owner of a water right wishes to change a water right … he shall file a petition requesting permission to make such a change …. The change … may be allowed provided that the quantity of water transferred … shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5.17[5] (1988)(*a water holder can only transfer the amount that he has historically put to beneficial use and consumed* – the increment diverted but not consumed must be left in the stream to protect junior appropriators); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at 271("The issues of waste and historic use, as well as misuse, nonuse, and abandonment, may properly be considered by the administrative official or water court when acting on a reallocation application," citing Basin Elec. Power Coop. v. State Board of Control, 578 P.2d 557, 564 (Wyo. 1978)); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a reallocation, it is appropriate to consider abandonment of the water right).

The requirements of Montana's change statute have been litigated and upheld in In re Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991)(applicant for a change of appropriation has the burden of proof at all stages before the Department and courts, and the applicant failed to meet the burden of proving that the change would not adversely affect objectors' rights; the application was properly denied because the evidence in the record did not sustain a conclusion of no adverse effect and because it could not be concluded from the record that the means of diversion and operation were adequate).

Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont. Code Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the change

adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

> In a reallocation proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation are estimated. Such estimates are usually made by civil engineers. With respect to a reallocation, the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation. This investigation involves an examination of historic use over a period that may range from ten years to several decades, depending on the value of the water right being reallocated.
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> ....
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> Expected consumptive use may not exceed historic consumptive use if, as would

typically be the case, junior appropriators would be harmed. If an increase in consumptive use is expected, the quantity or flow of reallocated water is decreased so that consumptive use is not increased.

2 Water and Water Rights at § 16.02(b) at 279-80.

The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, no matter how recently the water right was decreed in Montana's adjudication. The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer, Final Order, (1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, Final Order, (1992). Although since Montana started its general statewide adjudication there is no Montana Supreme Court case on point to support the conclusion that even water rights as decreed in final decrees will be limited in change proceedings to their historical use, that conclusion is supported by the case of McDonald v. State, , 220 Mont. 519, 722 P.2d 598 (1986). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under Mont. Code Ann. § 85-2-402.

In the case currently before this Hearing Examiner, Applicant and Applicant's witnesses provided very limited factual evidence to quantify the amount of water historically used – flow rate, volume, period of use and consumption. There is evidence of historical irrigation in the form of the 1953 Gallatin County Water Resources Survey; Exhibit A-5 depicting photos of the

place of use; and Exhibit A-6 depicting contour ditches throughout the place of use. The record also contains copies of the Statements of Claim, a Masters Report and crop consumption tables for optimal production. However, for purposes of this change proceeding the amount of water historically consumed was simply an estimation based on maximum crop production (Jan Mack). The methodology employed was based on assumption, not actual use. It's important to note that the proposed new use would divert 226.0 gallons per minute continuously from May 1 through November 30 of each year. By comparison, the crop consumption table (Department file) indicates the normal growing season for the area, for alfalfa production, is May 12 through September 20. This is 82 days less than the proposed period of diversion. The Hearing Examiner is not convinced the proposed volume of water (213.0 acre-feet) to be used was ever diverted to or consumed by the 85 acres to be changed. Montana has no legal standard in a water right change proceeding for assigning a volume for historic use. The actual historic use of water could be less than the optimum utilization represented by the duty of water in any particular case. Application for Water Rights in Rio Grande County (2002) __Colo. __, 53 P.3d 1165. It is the applicant's burden to produce this evidence of historical use, and not doing so constitutes a failure of proof.

The Applicant has not proven by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected. Applicant has not identified the historic use or the historic consumptive use for each water right proposed for change. Without this information, the Department cannot issue a change in appropriation water right. Mont. Code Ann. § 85-2-402(a);

Proposed Decision, In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the application for change number 41H 30000806 by Montana Golf Enterprises, LLC (November 19, 2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn).; Application for Water Rights in Rio Grande County (2002) __Colo. __, 53 P.3d 1165. See Finding of Fact Nos. 8 and 9.

3. The Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact No. 10.

4. The Applicant has proven by a preponderance of evidence that the applicant has a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See Finding of Fact No. 14.

5. The Applicant submitted testimony on the amount of water proposed for the requested fisheries use. The amount of water required for a particular fisheries use is a complicated matter. The Department declines to reach a conclusion on this issue because the change application will not be granted on other grounds as herein set forth. The Applicant has not proven the amount of water requested for the proposed use of fire protection is a beneficial use. See Finding of Fact Nos. 11, 12, and 13.

6. The application does not involve salvaged water. Mont. Code Ann. § 85-2-402(2)(e). See Finding of Fact No. 15.

7. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, or to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-402(2)(f), (g). See, Finding of Fact No. 16.

8. The Department may not grant an Authorization to Change a Water Right unless the Applicant proves all of the criteria in Mont. Code Ann. § 85-2-402 by a preponderance of the evidence. Applicant has not proven that all of the applicable criteria have been met. See Conclusion of Law No. 2. Mont. Code Ann. § 85-2-402(2).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application to Change a Water Right No. 41H 1223599, by MGRR #1, LLC is hereby **DENIED**.

NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by April 11, 2005, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by May 2, 2005, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

Dated this 22 day of March, 2005.

Scott Irvin

Scott Irvin
Hearings Officer
Water Resources Division
Department of Natural Resources
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PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of this PROPOSAL FOR DECISION was served upon all parties listed below on this 22 day of March, 2005, by First Class United States mail.

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